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QUESTIONS PRESENTED

1. Does the Age Discrimination in Employment Act (ADEA) definition of "employee," 29 U.S.C. § 630(f), which exempts "appointee[s] on the policy making level," and "person[s] elected to public office," include under its coverage state-court judges selected pursuant to the Missouri Non-Partisan Court Plan?

2. If the ADEA does apply to Missouri state-court judges, does the application of that Act to a uniquely state function violate the Tenth Amendment?

3. Whether a state constitutional provision mandating the retirement of its judges at age 70 violates the Equal Protection Clause, or, rather, rationally furthers a legitimate state purpose.

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Delmuth v. Muth, 491 U.S. ___, 109 S.Ct. 2397 (1989) 27

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H. Rep. No. 92-238, and 92d Cong. 2d Sess., *reprinted in* 1972, U.S. Code Cong. & Admin. News 2137, 2153, 2155 ... 22

118 *Congressional Record* (1972) 24,25

Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 1968 Wash. U. L. Q. 378 39

A. Corbin, *Corbin on Contracts*, § 1375 (1962) 18

Justice Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 535 (1947) 16

O. W. Holmes, Jr., *The Common Law* (1881) 21

L. Tribe, *American Constitutional Law*, § 6-25 (2d Ed. 1988) 28

Selected Writings of Benjamin Nathan Cardozo, "The Nature of Judicial Process," Margaret E. Hall (1947) 21

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Judicial Selection in the United States: A Compendium of Provisions, American Judicature Society 10

Judicial Selection in the States' Appellate and General Jurisdiction Courts, Summary of Initial Selection Methods, American Judicature Society 10

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Absent from the petitioner's brief is the complete text of Article V, Section 25(c)(1), which relates to the retention of judges selected under the Missouri Non-Partisan Court Plan.

> Each judge appointed pursuant to the provisions of sections 25(a)-(g) shall hold office for a term ending December thirty-first following the next general election after the expiration of twelve months in the office. Any judge holding office, or elected thereto, at the time of the election by which the provisions of sections 25(a)-(g) become applicable to his office, shall, unless removed for cause, remain in office for the term to which he would have been entitled had the provisions of sections 25(a)-(g) not become applicable to his office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 25(a)-(g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. If a declaration is not so filed by any judge, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided. If such declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote within the state if his office is that of judge of the supreme court, or within the geographic jurisdiction limit of the district where he serves if his office is that of a judge of the court of appeals, or within the circuit if his office is that of circuit judge, or within the county if his office is that of associate circuit judge on a separate judicial ballot, without party designation, reading:

"Shall Judge _____ (Here the name of the judge shall be inserted) of the _____ (Here the title of the court shall be inserted) be retained in office? Yes_____ No_____ (Mark an "X" in the box you prefer.)"

If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in section 25(a); otherwise, said judge shall, unless removed for cause, remain in office for the number of years after December thirty-first following such election as is provided for the full term of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed.

No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and
ANTHONY P. NUGENT, JR.,
Petitioners,

v.

JOHN D. ASHCROFT,
Governor of the State of Missouri,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

This is a suit seeking an injunction against the Governor of the State of Missouri to prohibit him from exercising his constitutional responsibility to select successors to the petitioners, Missouri state-court judges, after they attain the mandatory retirement age of 70. The questions presented include consideration of whether judges appointed under the Missouri Non-Partisan Court Plan are employees covered by the Age Discrimination in Employment Act (ADEA) and whether the Equal Protection Clause prohibits a state from providing for the retirement of its judges at age 70. The district court dismissed the suit, holding that these petitioners are exempted from coverage under the

ADEA as "appointee[s] on the policy making level" and that Missouri had a rational basis for the mandatory retirement provision of its state Constitution. The court of appeals affirmed.

Selection, Retention, and Retirement of Judges in Missouri

In the majority of jurisdictions within the State of Missouri, circuit and associate circuit judges are selected by a vote of the people. The elections are partisan and political. § 478.010, RSMo 1986. With respect to specified jurisdictions and courts, some judges are appointed by the Governor (Art. V, § 25(a)), with the caveat that the people do vote on whether to retain such judges in office (Art. V, § 25(c)(1)). Petition, pp. 4, A-27. The judicial selections made by the Governor are from slates of candidates submitted by a constitutionally mandated judicial selection commission. The constitutional provisions outlined constitute what is known as the Missouri Non-Partisan Court Plan (hereinafter the "Missouri Plan"). Its provisions apply to the appellate courts of the State of Missouri and to the circuit courts in the St. Louis and Kansas City metropolitan areas. The petitioners are judges selected pursuant to the Missouri Plan. Judges Gregory and Nugent do not contend that those judges selected in partisan elections are employees covered by the ADEA.

Judges covered by the Missouri Plan are subject to elections. Art. V, § 25(c)(1), Petition, p. A-27. After a defined term, such a judge is required to file in the office of the Secretary of State of Missouri a declaration of candidacy for election to succeed himself if he desires to retain his judicial office. If such a declaration is filed, the question of whether to retain said judge is determined by a majority vote of the people at the next general election.

All Missouri state-court judges, whether initially selected pursuant to the Missouri Plan or initially elected, are subject to the provisions of Article V, Section 26, of the Missouri Constitution.

> (1) All judges other than municipal judges shall retire by the age of seventy years, except as provided in the schedule to this article, under a retirement plan provided by law.

> (2) All judges may retire at an earlier age authorized by law and may participate in a retirement plan provided by law.
>
> (3) Any retired judge, associate circuit judge, or commissioner, with his consent, may be assigned by the supreme court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge, he shall have the same powers as an active judge.

Section 476.682, RSMo Supp. 1988, provides a mechanism whereby persons who serve as senior judges or commissioners, after the age of 70, will receive compensation at the same annual rate as judges under 70.

The Contentions of the Parties in the District Court

The supplemental complaint in this suit was filed on July 22, 1988. J.A. 3-9.[1] It is this supplemental complaint which was dismissed by the district court. The complaint was based upon the 1974 amendment to the ADEA, Pub. L. No. 93-259, § 28, 88 Stat. 55, which extended the Act to states as employers, and the 1986 amendment to the ADEA, Pub. L. No. 99-592, 100 Stat. 1342, which eliminated the upper age limit of the Act, making it apply, for the first time, to workers age 70 and above. The supplemental complaint alleged that judges selected pursuant to the Missouri Plan are employees under the ADEA, and that mandatory retirement at age 70 is in violation of the Law. The supplemental complaint also alleged that the mandatory retirement of judges was in violation of the Equal Protection Clause of the Fourteenth Amendment because it discriminated against judges in that other state officials are not required to retire at age 70. The complaint sought an injunction against the Governor from enforcing Article V, Section 26, of the Missouri Constitution.

---

[1] The supplemental complaint was filed on behalf of four judges, three of whom were selected pursuant to the Missouri Plan and one of whom held office in a circuit where judges are selected in partisan elections. Only Judges Gregory and Nugent have pursued their case to this Court. Both Gregory and Nugent were selected pursuant to the Missouri Plan.

The Governor duly filed a motion to dismiss (J.A. 10) alleging that, as a matter of law, the Fourteenth Amendment did not apply to invalidate a state constitutional provision mandating the retirement of its judges and that state-court judges are not employees covered under the ADEA. In his suggestions and arguments before the district court, the Governor contended that judges selected pursuant to the Missouri Plan were both "appointee[s] on the policy making level" and "person[s] elected to public office." *Gregory v. Ashcroft*, U.S.D.Ct., E.D. Mo., Petition, p. A-20.

The Decision of the District Court

The district court granted the Governor's motion to dismiss. Petition, pp. A-17 through A-26. The trial court dismissed Count I of the supplemental complaint (the ADEA count) on the basis that judges selected pursuant to the Missouri Plan were excluded from the ADEA definition of "employee" because they were "appointee[s] on the policy making level." The district court dismissed the Fourteenth Amendment count on the complaint because it found that Missouri had a rational basis for the enactment of its constitutional provision respecting retirement of state-court judges, as represented by the Missouri Supreme Court case of *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. banc 1978). The lower court also found that the expression of Missouri's highest court of rational bases for retiring state-court judges was consistent with existing precedent from other jurisdictions. Petition, p. A-25.

The Decision of the Court of Appeals

The United States Court of Appeals for the Eighth Circuit affirmed. 898 F.2d 598 (8th Cir. 1990), Petition, pages A-1 to A-16. The Eighth Circuit first noted that the tenure of state -court judges "is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate . . . ." Petition, at page A-4. Because the application of the ADEA to state court judges is of such consequence and import, the Eighth Circuit determined that it would not find the ADEA to be in conflict with Missouri's constitutional provision mandating the retirement of state court judges unless it found that

"Congress clearly has expressed its intention to bring state court judges into the ambit of the federal statute." Petition, at page A-4. The Eighth Circuit failed to find an intent by Congress to preempt, via the ADEA, state law pertaining to the retirement of judges. To the contrary, the Eighth Circuit found the plain language of 29 U.S.C. § 630(f), which exempts "appointee[s] on the policy making level," as evidencing a clear-cut congressional intent to exclude state court judges, who do make policy, from the coverage of the Act. Petition, at pages A-6 to A-7. The Eighth Circuit did not find applicable legislative history to suggest a contrary result. Petition, at pages A-8 to A-9.

The Eighth Circuit noted that, in Missouri, some state-court judges are appointed by the Governor, and subjected to election for retention by the people, and some state-court judges are elected by popular vote. The irrationality of treating those judges initially appointed by the Governor as covered, under the ADEA, and treating judges initially elected by popular vote as exempted was obvious to the appeals court.

The Eighth Circuit also rejected the petitioners' contention that Missouri's constitutional provision pertaining to the retirement of judges was in violation of the equal protection clause of the Fourteenth Amendment. The Eighth Circuit found that the rational basis test was correctly applied by the district court. Petition, at pages A-13 to A-14. Further, the lower court found that the Missouri Supreme Court had articulated sufficiently rational bases for the mandatory retirement provision in the case of *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. banc 1978). Petition, at page A-15. The Eighth Circuit went on to find that the rational bases articulated by the Missouri Supreme Court were consistent with decisions on the same issue from other jurisdictions.

SUMMARY OF THE ARGUMENT

At issue in this case is whether a state constitutional provision mandating the retirement of state-court judges at age 70 is preempted by the ADEA or violates the Equal Protection Clause. If the ADEA is construed to preempt a state provision providing for the qualifications of its judges, it will be necessary to determine whether Congress acted

in excess of its authority under the Tenth Amendment. This is a matter of some concern to the states, because it involves an alleged federal intrusion into state autonomy. Thirty-eight states and the District of Columbia provide for the mandatory retirement of state-court judges or for the reduction or forfeiture of benefits of judges who do not retire.

1. Exempted from the ADEA statutory definition of "employee" are "appointee[s] on the policy making level." In Missouri, appellate court judges and trial judges in St. Louis and Kansas City are chosen pursuant to a merit selection process, which includes initial appointment by the Governor and subsequent retention elections. All other trial court judges are chosen in partisan political elections. Unless Missouri Plan judges are exempted as policy makers, the ADEA can be construed to prohibit the mandatory retirement of state supreme court judges, state appeals court judges, and metropolitan area trial judges, but to allow the mandatory retirement of elected trial judges *and* their personal appointees. "Thus, an employee, such as a law clerk hired by an elected judge to be on his personal staff, would be exempt from the ADEA, while the highest ranking judges in Missouri would be covered by the Act simply because they are appointed." *Gregory v. Ashcroft*, 898 F.2d 598 (Petition, p. A-10). Further, states which choose to select their judges by initial election would be immune from the ADEA, but states which choose a merit selection process for some or all of their judges, like Missouri, would have their autonomy with respect to the qualifications of judicial officers preempted. The policy makers exemption should be rationally read to apply to all branches of state government, including the judicial branch. The language of the exemptions from the definition of "employee," 29 U.S.C. 630(f), does not, on its face, purport to apply to the executive and legislative branches only. Rather, the language demonstrates that Congress intended two categories: "policy makers, who need not be advisors; and advisors, who need not be policy makers." *EEOC v. Massachusetts*, 858 F.2d 51, 56 (1st Cir. 1988).

The exemption applies to state-court judges because judges do make policy. The judiciary, which has authority to interpret, clarify, and invalidate the rules of the executive branch and the laws of the legislative branch, is a powerful policy making force significantly

affecting the everyday lives of Missourians. The common law of Missouri, which is a culmination of innumerable judicial decisions of individual judges, is as compelling a body of public policy, and as binding on the citizens of Missouri, as all the statutes passed by Missouri's legislatures and all the regulations promulgated by Missouri's executives. "Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy . . . ." O. W. Holmes, Jr., *The Common Law*, at 35-36 (1881).

Application of the ADEA to state-court judges and to mandatory retirement provisions for same, was never considered by Congress in enacting the 1974 and 1986 amendments to the ADEA. The petitioners rely upon legislative history attendant to Title VII of the Civil Rights Act of 1964. Reliance on such legislative history is a tenuous basis on which to construe the enactments of later Congresses. Nevertheless, Title VII legislative history suggests that judges should be exempt from ADEA coverage. Title VII senatorial debates demonstrate that Congress was concerned that the highest levels of all branches of state government, including the judicial, be insulated from federal intrusion. 118 *Congressional Record* at 1677, 1838 (1972).

The preemption of state constitutional provisions mandating the retirement of judges should require a "clear statement of congressional intent." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). There is no clear statement in the language of the ADEA, nor in such legislative history as is available, that Congress intended to deprive the people of the State of Missouri of the right to make judgments about the qualifications of their judges. The states have the power to establish the qualifications for state judicial positions. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). It should not be presumed that Congress intended to preempt such right unless the congressional purpose to do so is clear and manifest. *California v. ARC America Corp.*, 491 U.S. ___, 109 S.Ct. 1661, 1665 (1989).

There are public policy considerations which support a finding that appointed state judges are exempt from the ADEA. Such a result would avoid a significant intrusion upon state sovereignty; remove the

federal government from participation in state controversies about whether judges should be appointed or elected (if Missouri Plan judges are not exempt from the ADEA, it must be assumed that Missouri will consider electing all its judges, and that other states which now use merit selection systems will revert to the outmoded practice of electing judges); and avoid consideration of the important Tenth Amendment issues which would ensue from preemption of state constitutions.

2. Title 29 U.S.C. § 630(f) provides another applicable exemption for Missouri Plan judges, "person[s] elected to public office." Missouri Plan judges, after initial appointment by the Governor from nominations from nonpartisan judicial commissions, must run in retention elections in which the people determine whether those judges will remain in office. The EEOC has taken the official position that such a process results in elected judges. Whether Missouri Plan judges are elected or appointed is a matter which should be determined by reference to Missouri law. Missouri law provides that they are elected officials. Op. Mo. Atty. Gen. No. 88 (1973).

3. If the effect of the 1974 and 1986 amendments to the ADEA is to preempt state mandatory retirement provisions for judges, the Tenth Amendment precludes that result. There is no indication that Congress intended, or considered, the extension of ADEA coverage to appointed state-court judges. Given the lack of a "clear statement," it is obvious that the political processes referred to in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), have been defective in protecting the states from an important incursion upon their sovereignty. After *Garcia*, the federal judiciary should retain the obligation of reviewing federal assaults on the integrity of the states to determine whether the national political process has worked.

If the ADEA has preempted the right of the states to determine the qualifications of their judges, this might be an appropriate occasion upon which to review the validity of *Garcia* and *EEOC v. Wyoming*, 460 U.S. 226 (1983). Congress should not be "the sole judge of the limit . . . [its] own power." *Garcia, supra*, 469 U.S. at 567 (Powell, J., dissenting). It might now be the time to determine whether Chief Justice Rehnquist and Justice O'Connor were correct in predicting that

Garcia had a limited life span. *Garcia, id.* at 589 (O'Connor, J., dissenting).

4. Petitioners also contend that the mandatory retirement of state-court judges is in violation of the equal protection clause, but the petitioners do not now and have never cited a single case in which a state mandatory retirement provisions was invalidated under the Fourteenth Amendment. *Gregory v. Ashcroft, supra*. Petition, p. A-13. This Court has never found old age to be a suspect class. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*). There is no fundamental right to employment as a state judge. Therefore, Missouri need only demonstrate mandatory retirement of judges is a rational means to accomplish a legitimate state purpose. *San Antonio School District v. Rodriquez*, 411 U.S. 1 (1973). There are numerous cases considering and validating various rational bases for the retirement of state judges. The precedent is unanimous: the rational bases relied upon to require the retirement of judges could reasonably be conceived as true by Missourians when ratifying their state Constitution. *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

ARGUMENT

In this case, the Court is called upon to determine whether it is permissible for a state to provide, in its constitution, for the retirement of its judges at age 70. This is a matter of great importance to the several states, and could have a significant impact on the nature and extent of their sovereignty. The majority of the states have a specific, vested interest in the outcome of this litigation. Based upon the best and most recent published figures available, thirty-six states and the District of Columbia presently provide for the mandatory retirement of all state-court judges. Two states do not require *mandatory* retirement, but provide for the reduction or forfeiture of benefits after a judge has attained a certain age without retiring.[2]

The first question which this Court must determine is whether the ADEA prohibits a state from mandatorily retiring its appointed judges or its judges chosen pursuant to a merit selection process. It does not if such judges are "appointee[s] on the policy making level." The resolution of this question is of considerable significance to those twenty-nine states and the District of Columbia that appoint or apply a merit selection system to at least some of their state-court judges.[3]

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[2] *Judicial Retirement Plans*, Timothy Pyne, updated by Thomas F. Sammons, American Judicature Society, April 16, 1985. The thirty-six states which provide for mandatory retirement of judges inlclude Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. The twelve states which do not provide for mandatory retirement of judges include Delaware, Florida, Kentucky, Mississippi, Nevada, New Mexico, North Dakota, Oklahoma, Rhode Island, Tennessee, West Virginia, and Wisconsin. California does not mandate retirement, but provides for diminished benefits after age 70. Maine does not mandate retirement, but provides for the forfeiture of benefits after age 71.

[3] *Judicial Selection in the United States: A Compendium of Provisions*, Larry Berkson, Scott Beller, and Michele Grimaldi, American Judicature Society; *Judicial Selection in the States' Appellate and General Jurisdiction Courts, Summary of Initial Selection Methods*, American Judicature

(Footnote 3 continued on next page)

Whether or not judges like the petitioners are exempted from coverage under the ADEA as policy makers is the subject of Point I of this Brief.

In Point II, we explain why judges chosen under a merit selection process, like the Missouri Plan, are exempted from coverage under the ADEA as "person[s] elected to public office." Again, this is an extremely important issue to those twenty-three jurisdictions which select some or all of their judges pursuant to a merit process analogous to the Missouri Plan.[4]

If the ADEA applies to petitioners, as employees, this attempted application violates the Tenth Amendment under existing case law, but if that is not clear under existing precedent, then *Garcia* and *EEOC v. Wyoming* should be reexamined. Point III of the Brief addresses this subject.

In Point IV, we submit that a state has rational bases for establishing a mandatory retirement provision for state-court judges, and that the mandatory retirement provision of the Missouri Constitution is a reasonable and logical means by which to effectuate those rational and legitimate state interests.

(Footnote 3 continued)

Society, 1986, Revised 2/7/89. Those states which appoint all their judges via merit selection process include Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Mexico, Utah, Vermont, and Wyoming. Those states which have a merit selection process for some judges and elect others include Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and Tennessee. Those states in which either the governor or the legislature appoints judges without a merit process include California, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina, and Virginia. Those states which choose their judges in partisan elections include Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Texas, and West Virginia. Those states which select their judges in nonpartisan elections include Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin.

[4] Please refer to footnote 3, *supra*.

I.

STATE COURT JUDGES SELECTED PURSUANT TO THE MISSOURI PLAN ARE EXEMPTED FROM COVERAGE UNDER THE ADEA AS "APPOINTEE[S] ON THE POLICY MAKING LEVEL."

A. The Clear Language of the Policy Making Exemption Evidences an Intent to Exclude Appointed Judges Because Judges Do Make Policy.

Specifically at issue in the ADEA attack on Missouri's constitutional provision mandating the retirement of its judges is the statutory definition of "employee."

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff *or an appointee on the policy making level* or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (emphasis added). This definition of "employee" was included in the 1974 amendments to the ADEA, amendments which also expanded the definition of "employer" to apply to the states and their political subdivisions. 29 U.S.C. § 630(b), Pub. L. 93-258 § 28(a), 88 Stat. 74. No ADEA challenge was mounted against mandatory retirement provisions for state-court judges until the upper age limit of the ADEA was eliminated. The prohibitions of the ADEA originally applied only to individuals who were at least 40, but less than 65, years of age. This maximum age ceiling was increased to age 70 in 1978, Pub. L. 95-256 § 3(a), and was eliminated in 1986, Pub. L. 99-272 § 2(c), effective January 1, 1987.

After the 1986 amendment, numerous courts have addressed the application of the ADEA to the mandatory retirement of state-court

judges.[5] Including the district court and the court of appeals in this case, the majority of the courts considering the issue have found that the proscriptions on age discrimination included within the ADEA are inapplicable to state-court judges. *EEOC v. Massachusetts*, 680 F. Supp. 455 (D. Mass. 1988); *EEOC v. Illinois*, 721 F. Supp. 156 (N.D. Ill. 1989); *In re Stout*, 521 Pa. 571, 559 A.2d 489 (1989); *Apkin v. Treasurer and Receiver-General*, 401 Mass. 427, 517 N.E.2d 141 (1988); and *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988).

Exempted from the ADEA are "appointee[s] on the policy making level." 29 U.S.C. § 630(f). If judges selected pursuant to the Missouri Plan are indeed "appointee[s],"[6] they fall within the clear language of the exception provided for by Congress. For the majority of jurisdictions in Missouri, state judges are selected in partisan elections. The remainder of Missouri's judges, members of the Supreme Court and the courts of appeal and circuit and associate circuit judges in our State's two major metropolitan areas, are chosen pursuant to the Missouri Plan, which includes an initial appointment by the Governor. The anomaly of treating Missouri's elected judges as not covered under the ADEA, and, therefore, subject to mandatory retirement, while treating Missouri Plan judges as covered under the ADEA, in which case their mandatory retirement would be preempted by federal law, was duly noted by the Eighth Circuit.

> Thus, an employee, such as a law clerk hired by an elected judge to be on his personal staff, would be exempt from the ADEA, while the highest ranking judges in Missouri would be covered by the Act simply because they are appointed. We conclude that Congress's designation of "appointee[s] on the policy making level" as an exemption to the ADEA definition of "employee"

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[5] The only courts which have invalidated state mandatory retirement provisions under the ADEA are the Second Circuit in *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990); the Eastern District of Virginia in *Schlitz v. Virginia*, 681 F. Supp. 330 (E.D. Va. 1988); and the Vermont District Court in *EEOC v. Vermont*, 717 F. Supp. 261 (D. Vt. 1989).

[6] See Point II, *infra*.

> manifests an interest in excluding persons entrusted with extensive decision making authority and discretionary power from the protection of the Act. There is no rational basis for deeming this interest to be more compelling in the executive and legislative branches than in the judiciary and we refuse to embrace such an inconsistent result. . . .
>
> In Missouri, where the majority of state judges are elected, the rationality of not excluding appointed judges from the ADEA as "appointee[s] on the policy making level" is even more pronounced. There is simply no principled basis for treating Missouri's appointed judges differently from its elected judges for purposes of the ADEA.

Gregory v. Ashcroft, 898 F.2d 598, 603 (Petition, pp. A-10, A-11). In accord, see *Apkin v. Treasurer and Receiver-General*, 517 N.E.2d 141, 145 (Mass. 1988) ("There is no logical or rational reason why elected judges of the Supreme Court of Washington, for example, may be required by State law to retire at a given age and Justices of this court may not."); *EEOC v. Massachusetts*, 680 F. Supp. 455, 462 (D. Mass. 1988) (such an interpretation of the ADEA would result in "a line jumping sharply up or down as to levels of authority and levels of discretionary performance, depending on whether one served in an elective office (in which case even lower tier officers would be excepted in all three branches of government) or an appointed office (in which case persons serving in discretionary or advisory positions would be covered in the judicial branch and excepted in the other two branches)); *EEOC v. State of Illinois*, 721 F. Supp. 156, 159 (N.D. Ill. 1989) ("There is no principled basis, either in the language of the statute or an expressed legislative intent, to treat appointed judges differently from elected judges.").

The petitioners contend that the "appointee[s] on the policy making level" exemption does not apply to the judicial branch of government because the context suggests an intended application "only to persons who advise or work closely with the elected official that chose the appointee." Brief of Petitioners, pp. 17-18. Such an interpretation is contrary to the plain meaning of the written words. The exemptions from "employee" status within 29 U.S.C. § 630(f) include:

> 1. Any person elected to public office;
>
> 2. Any person chosen by an elected official to be on such official's personal staff;
>
> 3. An appointee on the policy making level; or
>
> 4. An immediate advisor with respect to the exercise of the constitutional or legal powers of an office.

The interpretation suggested by the petitioners would make the third exception entirely redundant. They suggest that all four exemptions apply only to the executive, and, perhaps, the legislative, branches of government.[7] If Congress meant only to exclude appointees having a close working relationship with elected officials, the language Congress chose does not say that. Furthermore, the third exemption does not say appointed policy makers, but appointees "on the policy making level."

Most state-court judges in Missouri are elected by the people. The petitioners do not suggest that such judges are covered by the ADEA. If the interpretation of the policy making exemption by the petitioners is correct, however, elected circuit and associate circuit judges in Missouri, together with persons chosen to be on the personal staffs of such judges, including docket clerks, law clerks, court reporters, and bailiffs, would apparently be exempted from coverage under the ADEA, while judges initially appointed by the Governor to the circuit bench in Missouri's major metropolitan areas and to the appellate bench would be covered. That is, the most powerful policy makers among all Missouri state-court judges, judges on the Missouri Supreme Court and Missouri appellate courts, are covered by the ADEA, but the docket clerk of the associate circuit judge in Missouri's smallest rural judicial circuit would be exempted from coverage.

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[7] It must be assumed that Congress knew that the majority of state-court judges are elected and that the first exemption applied to the judicial branch. Therefore, the third exemption is not "sandwiched" within a list applying only to the executive and perhaps legislative branches.

We agree with the First Circuit that the explicit language used by Congress in § 630(f) demonstrates that "Congress intended two categories: policy makers, who need not be advisors; and advisors, who need not be policy makers." *EEOC v. Massachusetts*, 858 F.2d at 56.

The logical extension of the petitioner's interpretation demonstrates how unlikely it is that Congress intended the result petitioners proffer: The people of Missouri, when enacting a state Constitution, intended that nonappellate court judges outside major metropolitan areas be policy makers and that appellate judges and metropolitan judges not be policy makers.

> If the policy making level exception is read in this limited manner, none of the four categories of exemptions from the coverage of the ADEA would apply to employees in the judicial branch in those states where judges are appointed. We believe it is highly unlikely that the Congress intended this result, and the implausibility of the total exclusion of the appointed members of the state's judiciary from any exemption under the ADEA, despite the total exemption of elected judges from the coverage of the Act, lays heavily against such a narrow reading of the policy making level exception.

Gregory v. Ashcroft, 898 F.2d 598, 602 (Petition, at p. A-8).

"Though we may not end with the words in construing a disputed statute, one certainly begins there."[8] The language of the exemption at issue should be read to exclude appointed state-court judges because judges clearly are *policy makers*. The conclusion of the Eighth Circuit on the matter of judges as policy makers is compelling:

> The reality of judging is that it is not always — and perhaps not even usually — merely a matter of mechanically applying settled, unambiguous principles of law to specific fact patterns as they arise .... In keeping with our common law tradition, judges

[8] Justice Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 535 (1947).

> in deciding the particular cases before them may establish either general standards or specific rules of decision that may be relied upon in the future by other judges, by other branches of government, by attorneys and other professionals in advising their clients, and by members of the public in planning their affairs, either individually or in organizations of every kind. Whatever the judicial philosophy of the particular judge, and whether he views his proper role as broad or narrow, his decisions — some of them at least — necessarily will involve issues previously unsettled and thus will create law. Within the boundaries established by settled law, and mindful that it is not for the judiciary to usurp the functions of other branches of government, judges must exercise the same sort of discretion in decision making, temper their rulings with the same sort of self restraint, and engage in the same sort of thoughtful judgment that is required of "appointee[s] on the policy making level" in the executive and legislative branches.

Gregory v. Ashcroft, 898 F.2d 598, 601 (Petition, pp. A-6, A-7). The decision of the First Circuit on this issue is also persuasive.

> While judges have at times been thought to act as somewhat mechanized law-and-fact processors, scientifically applying settled principles of law to established fact patterns, that image hardly meshes with the reality of judging.

* * *

This judicial type of policy making is unlike that done in the executive and legislative branches of government. It nevertheless requires the same kind of decision making, and the same kind of forward thinking that is required of "appointee[s] on the policy making level" in those other two branches of government. And it certainly concerns state government to a similar degree.

EEOC v. Massachusetts, 858 F.2d 52, 54-55 (1st Cir. 1988).[9]

It is submitted that courts, and individual judges, who have absolute authority to interpret, clarify, and invalidate the rules, regulations, and policy statements of the executive branch and the statutes enacted by the legislative branch are, if anything, more powerful makers of policy than are members of the other two branches of government. Missouri is a common law state. The very first Missouri statutory section embraces the common law in effect in England prior to the fourth year of the reign of James the First. Section 1.010, RSMo 1986. It has been said that "[o]ur entire body of what is described as the 'common law' is the result of innumerable court decisions based upon the judicial notions of sound social policy and human welfare." 6A A. Corbin, *Corbin on Contracts*, § 1375 at 18 (1962). The present common law of Missouri is a much larger, more complex and vastly different expression of public policy than was true at the time Missouri attained statehood. The vast body of policy reflected in our present common law is, for the most part, the result of individual decisions by state-court judges, and in every respect is as compelling, binding on our citizens, and impressive as the total number of statutes passed by all of Missouri's legislatures and much more comprehensive than any body of policy promulgated by the executive branch. "The common law is not a brooding omnipresence in the sky," wrote Justice Holmes, "but the articulate voice of some sovereign or quasi-sovereign that can be identified." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917). Missouri is such a sovereign and, in their respective spheres, both its legislators and its judges are called upon to supply the "articulate voice" of its common law. In terms both practical and historical, the

[9] The conclusion of the Second Circuit that judges are not policy makers is less persuasive than the decisions of the Eighth and First Circuits on that issue.

> Though such a judicial act may thus state or clarify a policy, any such statement or clarification is merely ancillary to the resolution of a particular controversy between parties.

EEOC v. Vermont, 904 F.2d 794, 800-801 (2d Cir. 1990). It is logical to assume that one who states or clarifies policy is, in fact, a policy maker.

judiciary is much more regularly assigned to attend the common law's development.

Judicial decision making, then, is an expression of public policy, no less, and perhaps more, compelling than the modes of expression available to the legislative and executive branches of government. To suggest, as the petitioners do,[10] that the policy recommendations made by the bureaucrats who are personally appointed to the staff of an executive are somehow a higher form of action than the policy interpretations and laws created by the judicial branch is untrue and unrealistic. The courts of Missouri do exercise their decision making power to make policy. In *Jones v. State Highway Commission*, 557 S.W.2d 225 (Mo. banc 1977), the Missouri Supreme Court abrogated sovereign immunity. In *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983), the Missouri Supreme Court effected a revolution in tort law by adopting a system of comparative negligence to replace doctrines of contributory fault and "last clear chance." In *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. Banc 1988), *aff'd* ___ U.S. ___ (1990), the Missouri Supreme Court established a public policy of this State respecting the treatment and withdrawal of treatment of comatose patients. A list of the public policies effectuated by decisions of the Missouri Supreme Court could proceed indefinitely. The lower state courts also make policy with respect to almost every decision they render. It is difficult, for example, to formulate a more policy-intensive process than fashioning a criminal sentence to fit a specific crime. If the law clearly mandated a given result based on the facts in every given case, computers could occupy the bench.

Missouri courts also have policy making responsibility outside the realm of judicial decision making. The Missouri Supreme Court makes rules establishing legal procedures and practice, and governing the professional conduct of the Missouri judiciary and the Missouri Bar. The Missouri Court of Appeals makes rules establishing procedures and practice. The Chief Justice of the Missouri Supreme Court, the Chief Judges of the divisions of the Court of Appeals, and the

[10] Brief of Petitioner, pp. 22-24.

Presiding Judges in the circuit courts all have general supervisory powers. Art. V, § 4, Constitution of Missouri. The state circuit courts, trial level courts of general jurisdiction, establish local rules of practice and have disciplinary power over practicing attorneys.

Implicit in the arguments of petitioners and the Second Circuit[11] is the suggestion that judges make law, which is entirely different from making policy. Apparently, the extension of that argument would require the conclusion that legislators do not make policy because they enact laws. Bureaucrats who serve on the personal staffs of elected officials are far less influential in the formulation of law and policy which guide the lives of individuals in the State of Missouri than are our judicial officers. In a sense, judges are superior as policy makers to both the executive and legislative branches of government. Both laws passed by the legislature and policies adopted by the executive are subject to review and interpretation and invalidation by the judiciary. The judges of this State have, and regularly exercise, the power to review and veto the policy decisions made by high level bureaucrats and the law and policy enacted by the Missouri Legislature. The Missouri state judiciary probably has a more powerful and lasting effect upon the people than does any elected governor or session of the general assembly. The only authority to which state-court judges must answer is embodied in the higher appellate courts. Each state-court judge, once appointed or elected, is expected to act independently. Not only is each Missouri state-court judge a separate and independent judicial officer, but each is at the very top of his or her policy making chain of command.

The process of judging was understood by Mr. Justice Cardozo to include policy making.

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make it precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the cauldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but has had a hand in the making.

Selected Writings of Benjamin Nathan Cardozo, "The Nature of the Judicial Process," Margaret E. Hall, p. 108-109 (1947).[12]

[11] *EEOC v. Vermont, supra.*

B. Available Legislative History Does Not Suggest that Congress Intended the ADEA to Apply to Appointed State-Court Judges.

When Congress amended the ADEA in 1974, to amend the definition of "employer" to include states and to amend the definition of "employee" to include the exemptions at issue in this case, and later amended the Act in 1986, to remove the age cap which made disputes about mandatory retirement provisions for state-court judges possible, no contemporaneous legislative history was produced which would assist the court in determining whether state judges are "appointee[s]

[12] Holmes explained the process of judging as eloquently:

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis.

O. W. Holmes, Jr., *The Common Law*, at 35-36 (1881).

on the policy making level."[13] Implicitly acknowledging the lack of legislative history associated with the amendments that made this controversy possible, the petitioners have attempted to find support for their position in the legislative history attendant to passage of amendments to Title VII of the Civil Rights Act of 1964. The Second Circuit did the same. *EEOC v. Vermont, supra*, 904 F.2d at 798.[14]

The best determinant of congressional intent is the language of a law itself. Legislative history should always be a secondary source. Even more tenuous is the application of legislative history produced in association with a 1972 law to determine the intent of Congress in passing 1974 and 1986 amendments to the ADEA. Furthermore, Title VII was enacted by Congress pursuant to its power under the Fourteenth Amendment. H. Rep. No. 92-238, and 92d Cong., 2d Sess., *reprinted in* 1972, U.S. Code Cong. & Admin. News 2137, 2153, 2154. Conversely, the 1974 amendments to the ADEA, which extended the Act to states and exempted policy makers, was passed in association with the Fair Labor Standards Amendments of 1974 pursuant to the power conferred upon Congress by the Commerce Clause. In addition, Title VII legislative history should not be used to narrow ADEA exemp-

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[13] With respect to the 1974 enactment of § 630(f), "[i]t is simply not a credible inference that a majority of the Members of Congress, voting on this matter, would have formed this intent and acted upon it, without one word of comment about it in the legislative history. For that to have happened, the issue would have had to be either noncontroversial or inconsequential. It was, in fact, neither." *EEOC v. Commonwealth of Massachusetts, supra*, 680 F. Supp. at 464. Further, "[i]t seems clear that Congress did not even consider the consequences of the 1986 amendment on the state judiciary." *Apkin v. Treasurer and Receiver-General, supra*, 401 Mass. at 435, 517 N.E.2d at 146.

[14] In support of the proposition that Title VII legislative history should be used to divine the intent of Congress in exempting policy makers from coverage under the ADEA, the petitioners cite *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979), and *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). These cases provide very meager support for petitioners' position. In *Oscar Mayer*, the Court found a procedural prerequisite to filing a Title VII claim also applicable to an ADEA claim consistent with *precedent* interpreting the original language. In *Lorillard*, a case involving the availability of jury trials in ADEA proceedings, the Court found that Congress intended different results on that issue in passing Title VII and the ADEA.

tions. The two laws involve fundamentally different impacts. A state lacks any sovereign right to racial or sexual discrimination in employment. The Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 had already established that proposition. The ADEA did not merely implement existing rights. The Thirteenth and Fourteenth Amendments and § 1983 are not applicable to issues of age. The difficulty of applying Title VII legislative history to the ADEA should be clear. This would be a much different case if Missouri disqualified persons from serving as judges based upon their race, sex, or national origin.

Yet, the 1972 amendments to Title VII suggest that Congress intended to insulate the states from Title VII liability with respect to elected officials and policy makers. Title VII legislative history does not suggest that Congress intended to distinguish between appointed and elected state-court judges. The petitioners rely upon a quotation from the *Congressional Record*. Brief of Petitioners, pp. 18-19. The petitioners' brief accurately quotes the *Congressional Record*, but does not quote the conference report itself. Because the conference report "represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of congressional intent . . . ." *Davis v. Lukhard*, 788 F.2d 973, 991 (4th Cir. 1986), *cert. denied*, 479 U.S. 868 (1986). The actual report states:

> It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policy making positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees' intent that this exemption shall be construed narrowly. Also, all employees subject to State or local civil service laws are not exempted.

H. Conf. Rep. No. 92-899 and S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess., *reprinted in* 1972, U. S. Code Cong. & Admin. News 2179, 2180. The conference report itself does not limit "departments or agencies" of a state to any one branch of government, nor are "policy

making positions" limited to those who advise elected officials. The exemption was intended to extend to "persons with comparable responsibilities at the local level," making it highly unlikely that Congress intended to exempt a mayoral appointee to the position of parks and recreation director, but not to exempt state judges appointed to constitutional courts of general jurisdiction. Furthermore, the language "such as cabinet officers" is illustrative, not restrictive. As the First Circuit ruled:

> In addition, the narrow construction mentioned by the conferees, on which the appellant's brief relies so heavily, is clearly intended to limit the reach of the exception down the chain of command, and not so much across agencies or departments. This is evident from the very language of the conferees, who place no restrictions on the number of agencies or departments covered, but limited the positions covered to those at the highest levels. Clearly, each judge is a separate and independent judicial officer, is at the very top of his particular "policy making" chain of command, responding, if we can call it that, only to a higher appellate court.

Equal Employment Opportunity Commission v. Commonwealth of Massachusetts, supra, 858 F.2d at 56.

The petitioners also cite senatorial debates on the Title VII exemptions. It is important to note that these debates occurred at a point in time when the policy makers exception was not included within the proposed amendment. That additional exemption, which is the subject of this case, was added later during House and Senate conferences. 118 *Congressional Record* at 7567 (1972). Nevertheless, those senatorial debates demonstrate that the Senate was concerned with all branches of state government, including the judiciary. Senator Ervin was concerned that extension of the ADEA to states should include exceptions.

> There is not even an exception in the bill to the effect that the EEOC will not have jurisdiction over the Governor of a State or the Lieutenant-Governor of a State, or both; statewide election officials; State judges, whether they are elected or appointed to office; clerks of superior courts of counties and their assistants; sheriffs of counties or their assistants; and the chiefs of police in municipalities. The bill would give the EEOC jurisdiction, even, over members of school boards, certainly where they are appointed.

118 *Congressional Record* at 1677 (1972). He asked whether the bill included "the supreme court justices of the State" and the "other men who exercise executive and judicial power." *Id.* at 1811. He further asked whether "the bill in its present form would give Federal district courts the ultimate power to compel States and subdivisions of States to yield to their decrees with respect to the employment of persons who exercise the legislative, executive, and judicial powers of the States and political subdivisions of States?"[15] *Id.* at 1838.

Senator Taft, who was a member of the Senate Labor and Public Welfare Committee which had reported out the bill, stated that he did not intend to include elected officers, and that he "would be quite willing to go considerably further and perhaps to cover other personnel as well, and to cover those at the top decision making levels in the executive and judicial branches as well." *Id.* It was after the colloquys between Senator Ervin and Senator Taft that the first exemptions to the definition of "employee" were added to the Senate bill. Amendment No. 888, *id.* at 4095. That amendment did not contain the policy making exemption. The final version of the law, containing the policy making exception, was added in conference. As Congressman Erlenborn, one of the House Managers, stated:

> In the other body, an exemption was made for elected officials and immediate legal advisors. In the conference, an additional qualification was added, exempting those people appointed by officials at the State and local level in policy making positions.

118 *Congressional Record* at 7567.

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[15] Senator Ervin represented North Carolina, a state which elects all its judges. *See* fn. 3, *supra*. He had no reason to consider whether appointive exceptions applied to judges.

It is clear that in amending Title VII, which deals with invidious race, sex, and national origin discrimination, Congress was concerned that states be insulated from liability with respect to their highest officials in all branches of government.

There is a different, collateral reason to believe that Congress did not intend to prohibit the states from requiring the mandatory retirement of their judges. There are maximum age limits of 64 for appointment and 70 for retention for chief judges of both the U. S. Court of Appeals and district courts. 28 U.S.C. §§ 45(a)(1)(A) and (2)(C) and §§ 136(a)(1)(A) and (2)(C).

There is no evidence in any available legislative history to suggest that Congress even *considered* whether the prohibitions of the ADEA would apply to appointed state-court judges, much less that Congress *intended* such a result. As discussed in the next subsection of this brief, in order for Missouri's constitutional provision for mandatory retirement of state judges to be preempted by federal law, a clear statement of congressional intent to effect such a result must exist.

C. Federal Preemption of a State Constitutional Provision Should Not be Presumed Absent a Clear Statement of Congressional Intent.

> Without question, the tenure of state judges is a question of exceeding importance to each state, and a question traditionally left to be answered by each state. Any federal encroachment on a state's freedom of choice in this area, therefore, strikes very closely to the heart of state sovereignty.

EEOC v. Massachusetts, supra, 858 F.2d at 54. In this case, the Eighth Circuit noted that the tenure of state-court judges "is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate . . . ." *Gregory v. Ashcroft, supra*, at 600, Petition, p. A-4. Because the application of the ADEA to state-court judges is of such consequence and import, the Eighth Circuit determined that it would not find the ADEA to be in conflict with Missouri's constitutional provision mandating the retirement of state-court judges

unless it found that "Congress clearly has expressed its intention to bring state-court judges into the ambit of the federal statute." *Id.* at A-4.

The citizens of the states have the right to make judgments about the qualifications of their judges and those of Missouri have done so in their Constitution. There is no clear statement in the language of the ADEA, nor in such legislative history as is available, that Congress intended to deprive them of that right. When Congress wishes to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

In *Delmuth v. Muth*, 491 U.S. ___, 109 S.Ct. 2397, 2401-2402 (1989), this Court stated:

> Rather, the salient point in our review is that it cannot be said with perfect confidence that Congress in fact intended in 1975 to abrogate sovereign immunity, and imperfect confidence will not suffice given the special constitutional concerns in this area.

The Court went even further, requiring clear evidence of congressional intent in the text of a statute and finding legislative history generally irrelevant to the inquiry whether Congress intended to abrogate the Eleventh Amendment. *Id.* at 2401. *Delmuth* is an Eleventh Amendment case, but the requirement of a clear statement extends to the facts in this proceeding as well.

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon* [citation omitted]; *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to preempt the historic powers of the states [citations omitted], or if it intends to impose a condition on the grant of federal money

> [citations omitted]. "In traditionally sensitive areas, such a legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Will v. Michigan Department of State Police, 491 U.S. ___, 109 S.Ct. 2304, 2308-2309 (1989).

"Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Thayer*, 143 U.S. 135, 161 (1892).

> And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."

Sugarman v. Dougall, 413 U.S. 634, 647 (1973). When Congress acts in an area traditionally occupied by the states, it must be assumed that the historic powers of the state are not superseded unless the congressional purpose to do so is clear and manifest. *California v. ARC America Corp.*, 491 U.S. ___, 109 S.Ct. 1661, 1665 (1989). It is a "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).[16] Congress has made no clear statement that it intended to preempt state constitutional provisions providing for the retirement of state-court judges. The very most that can be said on behalf of petitioners' position is that Congress may never have considered appointed state-court judges in association with the ADEA. The exercise of federal supremacy should not be lightly presumed. *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 522 (1981).

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[16] Professor Tribe, not a champion of federalism or limitations on federal power, understands the special principles applied to preemption, and that there is an "overriding reluctance to infer preemption in ambiguous cases." L. Tribe, *American Constitutional Law*, § 6-25, at 479 (2d Ed. 1988).

D. Exemption of Appointed State-Court Judges from Coverage Under the ADEA is Consistent with Sound Principles of Public Policy.

There are several important public policy considerations which mitigate against the petitioners' interpretation of the "appointee[s] on the policy making level" exemption. In the first place, as discussed *supra*, the matter of qualifications, tenure, and retirement of state-court judges is traditionally a state prerogative and should remain so. The people of the State of Missouri have chosen to provide for the mandatory retirement of state-court judges in their Constitution. The constitutional provision for the retirement of state-court judges was submitted to a vote of the people and was passed overwhelmingly. If the Court should approve of the petitioners' position, it would sanction a significant intrusion upon state sovereignty. The principles of federalism should preclude such a result.

Second, a slight majority of states now choose to select some or all of their judges by various merit selection processes, all of which include an element of appointment.[17] In Missouri, appellate judges and trial judges in Kansas City and St. Louis are selected this way, while judges in outstate Missouri are selected by partisan election. If the ADEA is construed to apply to judges selected pursuant to the Missouri Plan, there will be a very strong incentive for the State to change its selection process to provide for the partisan election of all its judges.[18] It is unlikely that Congress intended to dictate to the states whether judges should be elected as opposed to appointed. Nevertheless, a decision extending the coverage of the ADEA to appointed state-court judges would have that very effect.

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[17] See footnote 3.

[18] Shortly after the American Judicature Society was founded, its first director of research, Albert M. Kales, developed a plan for the merit selection of judges. In 1940, Missouri became the first state to adopt the Kales proposal for the selection of some of its judges. Therefore, current merit or commission plans in effect are often referred to as being patterned after the Missouri Plan. Further, there now exists in Missouri a significant debate about whether all judges should be selected under the Missouri Plan. ADEA extension to state judges would intrude upon that debate.

> The underlying concerns manifested by adoption of this exception emphatically do not include a congressional interest in taking sides in the currently active controversies within many states about whether judges shall be elected or appointed. Yet, plaintiff's proposed reading of the statute would introduce into the political dispute on this controversial issue of state government a federally-imposed factor significantly weighing against a choice by the state electorate to have judges appointed. Is it a reasonable interpretation of this definition of "employee" that the Act was designed to accomplish this rather significant intrusion into state political choices?

EEOC v. Massachusetts, 680 F. Supp. 455, 461 (D. Mass. 1988). It is irrational to suggest that those states which elect their judges in partisan elections may choose to provide for their mandatory retirement, but that states that select their judges pursuant to a merit system, which includes an element of appointment, may not. Surely, the number of states which hold partisan elections for judges would increase if such were the case, and Missouri could be expected to seriously consider extending the election of judges to cover the appellate bench and trial judges in St. Louis and Kansas City.

Lastly, a finding that judges selected pursuant to the Missouri Plan were exempt from the ADEA would avoid a serious constitutional debate. As discussed in Point II of this brief, if the ADEA prohibits the mandatory retirement of state-court judges, the Tenth Amendment is implicated. Especially in light of the lack of a clear statement by Congress that it intended to preempt mandatory retirement provisions for state-court judges, it should not be necessary to consider whether the political processes referred to in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), have been sufficient to protect Missouri in this case; whether the extension of the ADEA to the states is an exercise of congressional authority under the Fourteenth Amendment or the Commerce Clause; whether *EEOC v. Wyoming*, 460 U.S. 225 (1983), should be distinguished or overruled; and whether *Garcia* should be modified or overruled.

II.

JUDGES SELECTED PURSUANT TO THE MISSOURI NONPARTISAN COURT PLAN ARE ALSO EXEMPTED FROM COVERAGE UNDER THE ADEA AS "PERSON[S] ELECTED TO PUBLIC OFFICE."

Not only does 29 U.S.C. 630(f) define "employee" to exclude "appointee[s] on the policy making level," it also exempts "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof . . . ." The district court determined that the "elected to public office" exemption did not apply to judges appointed and retained under the Missouri Plan. Petition, p. A-20, fn. 3. The Eighth Circuit was inclined to disagree with that conclusion but did not reach it. *Gregory v. Ashcroft, supra*, Petition, p. A-5. The petitioners have acknowledged that this issue is before the Court by addressing it in their brief. Petitioners' Brief, pp. 13-14.[19]

In Missouri, the judges of the state Supreme Court, the state court of appeals, and the circuit and associate circuit judges in the St. Louis and Kansas City metropolitan areas are initially appointed by the Governor. Art. V, § 25(a), Constitution of Missouri. The Governor fills judgeship vacancies from slates of nominees submitted by a nonpartisan judicial commission. The initial appointment is for a specified term. A judge so selected, who wishes to retain his office as a judge, must file in the office of the state Secretary of State "a declaration of candidacy for election to succeed himself." If the declaration is filed, the name of that judge is submitted at the next general election for eligible voters to determine whether to retain him. Art. V., § 25(c)(1). That process must be repeated at the expiration of each term.

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[19] Petitioners explicitly affirm that the "elected to public office" issue is before this Court in their "Reply to Respondent's Brief in Opposition." Moreover this Court has repeatedly held that a prevailing party may assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. *Dandridge v. Williams*, 397 U.S. 471, 475, fn. 6 (1970); *Vance v. Bradley*, 440 U.S. 93, 116 (1979) (Marshall, J., dissenting).

The EEOC has taken the official position that persons selected as judges pursuant to nonpartisan judicial selection processes, like that used in Missouri, are "elected to public office."

> [A] state or local judge who is elected by the general electorate or who is appointed by the Governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term "employee" under the ADEA as a "person elected to public office."

EEOC Opinion Letter to Rep. Claude Pepper, April 17, 1987, *reprinted in* EEOC Compliance Man. (BNA) at N:1001, n. 2.

In *EEOC v. State of New York*, 907 F.2d 316 (2d Cir. 1990), the Second Circuit was confronted with the case of a retired New York appellate court judge. The judge had retired at age 70 pursuant to the New York Constitution. New York state law allows its retired appellate judges to continue serving as judges until age 76, if properly certified by the appropriate administrative agency. *Id.* at 318-319.[20] The Second Circuit held that the ADEA was not violated by preventing certification after age 76. Such judges are "elected" because that was the original method of their selection, notwithstanding that later certifications were accomplished by administrative decision. *Id.* at 321. Most importantly, the Second Circuit opined that the question of whether New York certified judges are elected or appointed is a matter to be determined by state law.

> Such is the case here, where the term "elected to public office" is not defined in the ADEA and the question whether it should be interpreted to include certificated justices of the New York Supreme Court is a matter primarily of state concern.

Id.

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[20] Missouri has a similar provision in the mandatory retirement section of its Constitution. Art. V., § 26(3), Constitution of Missouri.

> Any retired judge, associate circuit judge, or commissioner, with his consent, may be assigned by the Supreme Court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge, he shall have the same powers as an active judge.

The only Missouri law on the issue of whether Missouri Plan judges are appointed or elected is represented by a 1973 Missouri Attorney General's Opinion.[21] That Opinion held that while a Missouri Plan vacancy is initially filled by nomination and appointment, that initial selection is only for a limited period of time after which the judge must file his declaration for candidacy pursuant to provisions for elective offices, and that Missouri Plan judges are, therefore, selected to elective office.

Because the issue of whether Missouri Plan judges are appointed or elected is primarily of interest to Missouri, state law holding that they are elected should be binding, there being no federal definition of the "elected to public office" exemption.

III.

EXTENSION OF THE ADEA TO PREEMPT A STATE CONSTITUTIONAL PROVISION RESPECTING THE QUALIFICATIONS OF MEMBERS OF THE STATE JUDICIARY WOULD VIOLATE THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Political Processes in Place to Protect the States Have Been Ineffective Because It Can Not Be Shown that Congress Intended or Even Considered the Extension of the ADEA to State-Court Judges.

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), expressly overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976). There is no doubt that under *National League of Cities* an express or implied attempt to preempt a state constitutional provision providing for the retirement of state-court judges at 70 would have

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[21] Op. Mo. Atty. Gen. No. 88 (1973). The opinion concerned a state legislator who wanted to accept the position of circuit judge in a Missouri Plan jurisdiction. The Missouri Constitution, Art. III, § 12, prohibits a legislator from accepting an appointive office, the salary for which has been increased during his term as a legislator.

been invalidated. The respondent submits that, should this Court find that Missouri state-court judges are employees under the ADEA, the preemption of the State Constitution can be invalidated under *Garcia*. The majority opinion in *Garcia*, in a five-to-four vote, abdicated from the federal courts to Congress the function of protecting the sovereignty of the states.

> But the principle and basic limit on the federal commerce power is that inherent in all congressional action — the built-in restraints that our system provides through state participation in federal governmental actions. The political process ensures that laws that unduly burden the States will not be promulgated.

Id. at 556. The *Garcia* majority recognized that the federal Constitution does contain unidentified and undefined limits on the power of the federal government, citing *Coyle v. Oklahoma*, 221 U.S. 559 (1911). In *Coyle*, Congress attempted invalidly to dictate the location of a state capital. It is just as invalid for Congress to dictate the selection, tenure, qualifications, and retirement ages of state-court judges. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

In *Garcia*, the majority opinion relied upon the states' participation in the national political process. In that case, there was no doubt whatsoever that the federal government specifically intended that the Fair Labor Standards Act was to be imposed on governmentally owned mass transit authorities. However, as discussed at some length in Point I of this Brief, there is no indication in the language of the ADEA definitions of "employer" and "employee" or in available legislative history to suggest that Congress intended, or even considered, whether the ADEA would prohibit the mandatory retirement of state-court judges. If this Court should determine that that is the effect of the 1974 and 1986 amendments to the ADEA, it should be apparent that the political processes supposedly in place to protect state sovereignty have not worked. There is no indication whatsoever that any Congressman intended or understood state-court judges to be implicated in the extension of ADEA coverage to the states and the removal of the age 70 upper limit on its coverage.

> Although *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulations of state activities invalid under the Tenth Amendment, the Court in *Garcia* had no occasion to identify or to find the defects that might lead to such invalidation.

South Carolina v. Baker, 485 U.S. 505, 108 S.Ct. 1355, 1360-1361 (1988). The national political processes worked in a defective manner if, as petitioners assert, the import of § 630(f), the 1974 extension of the ADEA to the states as employers, and the 1986 removal of the age cap is to effectively preempt a state constitutional provision providing for the retirement of its judges. It should be incumbent upon the federal judiciary to determine whether the national political process works to protect the sovereignty of the states. If that minimal function is not performed, the Tenth Amendment no longer exists and the states have no protection whatsoever from federal encroachment into their traditional authority.

B. If the Decisions of this Court in *Garcia* and *EEOC v. Wyoming* Cannot Be Distinguished From This Case, They Should be Reconsidered and, If Necessary, Modified or Overruled.

Congress should not be "the sole judge of the limit of . . . [its] own power." *Garcia, supra*, 469 U.S. at 567 (Powell, J., dissenting). The *Garcia* majority approach to federalism provides small comfort to proponents of state sovereignty. It provides, in effect, that because Missourians may vote in presidential elections and because two senators and nine representatives are Missourians, the continued independent existence of the State depends upon the forbearance of an imperial Congress and an overreaching federal bureaucracy. If the ADEA does not exempt state-court judges, the *Garcia* majority approach might preclude judicial review. The majority opinion in *Garcia* mentioned the Tenth Amendment exactly once, and that reference appears in a statement of the question presented. *Garcia, supra*, at 536.

Garcia reduces the Tenth Amendment to "meaningless rhetoric when Congress acts pursuant to the Commerce Clause." *Id.* at 560

(Powell, J., dissenting). The only protection for the state lies in the political decisions made by members of the federal government, decisions which will not be subject to judicial review. *Id.* at 560. Based upon *Garcia*, the role of the states in the federal system "may depend upon the grace of elected officials" (*Id.* at 560-561), as the balancing test of *National League of Cities* is rejected (*Id.* at 562). This approach is contrary to the text of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." *National League of Cities* had been faithful to the Tenth Amendment. The Court observed in that case that "our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of States as states by means of the Commerce power." *National League of Cities v. Usery, supra*, 426 U.S. at 842. "Indeed, the Court's view of federalism appears to relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy." *Garcia, supra*, 469 U.S. at 575 (Powell, J., dissenting).

As is noted in the dissent of Justice O'Connor, *Garcia* poses "a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the framers based their faith in the efficiency and vitality of our republic." *Id.* at 484. If the effect of the ADEA is to preempt state constitutional provisions providing for the qualifications of state judges, it is perhaps time to heed Justice O'Connor's admonition:

> I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice REHNQUIST's belief that this Court will in time again assume its constitutional responsibility.

Id. at 589.

Any reasonable assessment of traditional state functions would include the ability to create and maintain a court system. The Court should reinstitute judicial review of federal intrusions upon state sovereignty. It is now time to again embrace the balancing test of *National League of Cities v. Usery*.

If the effect of the ADEA, as amended, is to preempt state mandatory retirement for judges, it may also be necessary to revisit *EEOC v. Wyoming*, 460 U.S. 226 (1983). That case was decided after *National League of Cities* and before *Garcia*. Using the approach of the former with respect to issues of federalism, it held that application of the ADEA to a 55-year-old state game warden was not so great a federal intrusion on the "traditional" or "integral" functions of the state to override congressional action. *Id.* at 239.

EEOC v. Wyoming can be distinguished from this case. Application of the ADEA to a state park ranger is a significantly different proposition from application of the ADEA to a state's judiciary. However, it is difficult to assess the impact of *EEOC v. Wyoming* after *Garcia*. *Garcia* may have mandated the refusal to review Wyoming's situation altogether. Like *Garcia*, the majority opinion in *EEOC v. Wyoming* was a five-to-four decision. If the balancing test of *National League of Cities* were reinstated, it is difficult to reconcile the *EEOC v. Wyoming* result with that test. In both cases, Congress was intruding upon the ability of the states to provide the terms and conditions of employment of their own officials. To the extent that *EEOC v. Wyoming* is inconsistent with any action taken by the Court in this case, it should be modified or overruled.

IV.

MISSOURI'S CONSTITUTIONAL PROVISION PROVIDING FOR THE RETIREMENT OF JUDGES AT AGE 70 IS A RATIONAL MEANS BY WHICH TO FURTHER LEGITIMATE STATE INTERESTS AND IS NOT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The Eighth Circuit noted that it was "unable to find even a single case wherein a state mandatory retirement provision has been invalidated under the Fourteenth Amendment." *Gregory v. Ashcroft, supra*, Petition at p. A-13. The petitioners have not cured that defect in their Fourteenth Amendment argument by citing any cases on point in their brief.

Old age is not a suspect class and there is no fundamental right to government employment. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*). In *Murgia*, this Court specifically found that a mandatory retirement age statute for state police officers did not call for a strict scrutiny analysis. *Id.* at 314. Old age is not defined as a distinct, insular group for due process and equal protection analyses. A heightened level of analysis should not be applied to state laws or policies relating to age because they do not impermissibly interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The State of Missouri needs only to show a rational basis for retiring judges at the age of 70. The rational basis test applies to both equal protection and due process challenges. *Malmed v. Thornburgh*, 621 F.2d 565, 575-576 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980).

The Supreme Court of Missouri identified the existence of several rational bases for the retirement of judges. In *O'Neil v. Baine*, 568 S.W.2d 761, 766-767 (Mo. banc 1978), the highest court in Missouri addressed this issue as follows:

> Our citizens are entitled to a judicial system of the highest caliber and to judges with the highest possible mental and physical qualifications. Mandatory judicial retirement is an attempt by the General Assembly to insure the fitness of the judiciary as a whole and to insure the continued competency of the system. The General Assembly in adopting the statute dealt in probabilities. That is all humans can do. There are certain ages in life, learned from experience, at which there is a lessening in mental, physical abilities. If mandatory retirement is invalid at age 70, then at what age — 80, 90, or 100? To paraphrase Holmes, — in life, one must make choices. That is what the General Assembly did . The statute draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system. *Cf. Aronstam v. Cashman*, 325 A.2d 364. The statute is an attempt to insure that, on the whole, only those

> judges who have the vigor, health and vitality will carry out the public's work in administering justice. The function of mandatory retirement is to permit the withdrawal from the bench that group of judges in which disabilities related to aging are most likely to occur. Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 1968 Wash.U.L.Q. 378, 397.
>
> Second, the statute which is presumptively valid draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not. A mandatory provision avoids these traumatic and often lengthy hearings.
>
> Third, mandatory retirement increases the opportunity for qualified persons — men and women alike — to share in the judiciary and permits an orderly attrition through retirement. *See Townsend v. City of Los Angeles*, 122 Cal.Rptr. at 503.
>
> Such a provision not only achieves the maximum in qualified judicial personnel, but equally important widens the opportunities for qualified younger members of the Bar to seek a judicial post. Rephrasing *Palmer v. Ticcione*, a state might prescribe a mandatory retirement for judges in order to "open up" judicial opportunities for younger lawyers and to bring young persons with fresh ideas and techniques into the system.
>
> Fourth, such a mandatory provision also assures predictability and ease in establishing and administering judges' pension plans. The General Assembly, having the constitutional power to do so, has established a comprehensive retirement plan for judges based on retirement at age 70. As a corollary, the General Assembly must be able to plan and determine the amount of appropriations necessary to fulfill the statutory benefits provided for the retirement of judges. That is solely the function of the General Assembly.
>
> We remember the difficulties that arose from the absence of a mandatory retirement age for judges. We also recall that there were no provisions for survivors benefits. Judges were, of

necessity, forced to serve beyond the years of their physical and mental abilities. The judiciary, as well as others, pointed out these deficiencies to the General Assembly and they were corrected.

Furthermore, we know that age seventy is an age — a time of life — which is recognized by society as being "about" the time when the physical and mental processes weaken among many men and women. That recognition is embodied in statutes, in private retirement systems and in the policy of the Congress. All of this, and more, is embodied in the policy of § 476.458.

In sum, we conclude that compulsory retirement of magistrate and probate judges at age seventy embodied in the statute is rationally related to the fulfillment of several legitimate state objectives and hence the statute does not violate equal protection.

The court below relied upon this state court authoritative statement of rational bases. *Gregory v. Ashcroft, supra,* Petition at p. A-15.

The First Circuit also found rational bases for the mandatory retirement of judges.

> Massachusetts does not wish to take up the perilous task of evaluating the performance of its older judges, and impeaching or addressing (another method of removing from office) those the legislature feels are no longer qualified. The task is as undesirable as it is difficult, not only because it entails close legislative scrutiny of judicial performance, with a consequent loss to judicial independence, but also because the only constitutionally available methods of removing judges are extraordinary ones, not suited to the kind of pedestrian "discharge for cause" which the Commission argues is still open to the Commonwealth under the ADEA. In the second place, the other concerns expressed by the SJC [Massachusetts Supreme Judicial Court] go well beyond their capacity to perform. The forced turnover may permit the appointment of judges that more closely reflect prevalent points of view, as well as the present societal makeup (and may even permit the state to redress past inequities).

> While these concerns may not be sufficient to make a certain age a bona fide occupational qualification for judges, they are still important state interests that are met by the constitutional age limit.

EEOC v. Massachusetts, supra, 858 F.2d at 57-58.[22]

Other cases have identified rational bases for the retirement of judges. The mandatory retirement provision "eliminates the unpleasantness of selectively removing aged . . . judges." *Malmed v. Thornburgh, supra,* 621 F.2d at 572. It is rational to treat "judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode," and "[m]andatory retirement . . . reduces delays in the administration of justice caused by death or disabling illness of sitting judges," a risk which increases with age. *Trafelet v. Thompson,* 594 F.2d 623, 627-629 (7th Cir.), *cert. denied,* 444 U.S. 906. "A line drawn at age 70 eliminates the anguish, time, delay, expense and embarrassment of the supervision and removal of older judges of failing competence pursuant to an evaluation process," and it makes it possible to increase the proportion of minority group members and women in the judiciary, thereby making the judiciary more representative of society. *Apkin v. Treasurer and Receiver-General,* 401 Mass. 427, 517 N.E.2d 141, 146 (1988). The New York Court of Appeals accepted the following bases as rational:

> The mandatory retirement age limitation for State Judges is rationally related to the promotion of any or all of the following State interests: (1) advancement of general considerations of

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[22] The Missouri Plan in association with mandatory retirement allows governors to address past inequities. This has been evident from Governor Ashcroft's recent appointments. Of the six appellate panels incluidng women or minority candidates presented to Governor Ashcroft, a woman or minority has been selected six times. With respect to appellate *and* circuit court panels, twenty slates of nominess have been presented to the Governor which included women or minority members, and fourteen women or minority judges have been appointed by the Governor from those panels.

judicial efficiency (*Rubino v. Ghezzi*, 2d Cir., 512 F.2d 431, 433, *cert. denied*, 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122); (2) motivation and encouragement of qualified younger attorneys with judicial aspirations, by this orderly process of attrition (*Rubino v. Ghezzi, supra; Vance v. Bradley*, 440 U.S. 93, 100, 99 S.Ct. 939, 944, 59 L.Ed.2d 171, *supra*); (3) elimination of the unpleasantness and embarrassment of selectively removing aged and disabled Judges (*Malmed v. Thornburgh*, 3d Cir., 621 F.2d 565, 572, *cert. denied*, 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219); (4) prevention of harm by a few disabled Judges which more than offsets loss of Judges who retain full powers past age 70 (*Malmed v. Thornburgh, supra)*; (5) elimination of the administrative burden of testing each Judge attaining the age of 70 to assess competency; (6) avoidance of the economic burden of testing and removing incapable judges; and (7) the fixing of a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber Judges in the system (*O'Neil v. Baine*, 568 S.W.2d 761 [Mo]). The challenged provisions mandating retirement at the end of the year in which age 70 is reached manifestly have a rational basis.

Maresca v. Cuomo, 64 N.Y.S. 2d 252, 475 N.E.2d 95, 99 (1984), *appeal dismissed*, 474 U.S. 802 (1985).

Fatal to the petitioners' position is this Court's opinion in *Vance v. Bradley*, 440 U.S. 93 (1979). The Court found that a mandatory retirement provision for foreign service officers must be judged by the rational basis standard. *Id.* at 97. Like petitioners in this case (Brief, p. 31), the appellees in *Vance v. Bradley* contended that the Fourteenth Amendment required the employer to present "current empirical proof that health and energy tended to decline somewhat by age 60 and had to offer such proof for the District Court's perusal before the statute could be sustained." *Id.* at 110. Such a contention is incorrect.

> In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decision maker.

Id. at 111.

The petitioners rely primarily on *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In that case, the Court reaffirmed its decision not to extend heightened review to different treatment based on age and cited *Murgia, supra*, with approval. *Id.* at 441. *Cleburne* did not require that an evidentiary hearing be held in the trial court before a rational basis may be found. After *Cleburne*, this Court decided *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849 (1988). The record before the Court in *Pennell* consisted of a judgment on the pleadings. No evidence had been adduced. The Supreme Court found that the ordinance at issue in *Pennell* did not violate the due process and equal protection clauses of the Fourteenth Amendment.

> We also find that the ordinance does not violate the Amendment's Equal Protection Clause. Here again, the standard is deferential; appellees need only show that the classification scheme embodied in the Ordinance is "rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303. As we stated in *Vance v. Bradley*, 440 U.S. 93 (1979), "we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we could only conclude that the legislature's actions were irrational."

Id. at 14. The ordinance at issue in *Cleburne* was wholly irrational; the mandatory retirement of state-court judges is not.

In finding rational bases for the mandatory retirement of state-court judges to exist, no court has relied upon the presumption that judges over 70 are automatically unfit to judge. Many judges over the age of 70 may and do retain their full capabilities and could render essential judicial services. The State of Missouri is aware of that fact. In providing for the retirement of its judges at age 70, the State Constitution also allows these retired state-court judges to be assigned as

senior judges or special commissioners. Art. V, 26(3), Constitution of Missouri.[23] Contrary to the brief of the American Association of Retired Persons as *amicus curiae*, the State of Missouri has never submitted, as a rational basis for its constitutional retirement provisions for state-court judges, that persons over the age of 70 are naturally unfit to judge.[24] We assume that Congress, itself, made no such assumption when it set a maximum age of 70 for retention of Chief Judges of both the United States Courts Of Appeal and United States District Courts. 28 U.S.C. §§ 45(a)(1)(A) and 2(C) and § 136(a)(1)(A) and (2)(C).

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[23] This constitutional provision that allows retired state-court judges to continue to provide judicial services constitutes another rational basis for mandatory retirement. In approving a constitution, the people of the State of Missouri may have intended to increase the availability of judicial resources generally, by having both judges and retired senior judges and special commissioners available for judicial duty, without relying upon the state legislature to create and fund additional judicial positions. *See Malmed v. Thornburgh*, 621 F.2d 565, 572 (3d Cir. 1980).

[24] This is another example of petitioners having missed the point. Brief of Petitioner, p. 31. It has never been Missouri's contention that most or all judges over age 70 are incompetent. It is certainly not necessary to remand this case for the consideration of this non-issue.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

JAMES B. DEUTSCH
Deputy Attorney General

MICHAEL L. BOICOURT
Assistant Attorney General
Missouri Bar No. 20840
Counsel of Record

6th Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321

ATTORNEYS FOR RESPONDENT

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